

LEGAL MAN- UAL

Preface

My name is Harvey Friedman. I have worked on Disability Retirement 30 years, and practiced law for over 50. I am now retired, and am using this website to pass on the knowledge I have gained through years of practice.

This is NOT legal advice, but I hope it is useful information.

Doctors: The Most Important Thing

You're a dummy if you think you can just ask a doctor to write a Physician's Statement without giving them any guidance on how to craft it. You're an even bigger dummy if you think you can help them craft it.

You're a smarty if you recognize there is more to a Physician's Statement than medical gobbledegook.

Example: The runaway doctor writes: "The client has hypertension with a blood pressure of 180/2,000,000 and he has run out of white blood cells." This means zilch to an OPM adjudicator. They need to know if you can take medicine to treat the condition, the reason the blood pressure will prevent you from working, and much more. The problem is that the doctor doesn't know how to help you! He doesn't know what the OPM adjudicators want to hear. How would he? He may be a great doctor, but he's definitely not a lawyer who knows his way around OPM Disability Retirement.

Solution: Get someone who has done enough cases at OPM that they know what OPM adjudicators want to hear from a doctor. Your doctor doesn't know, and neither do you, your know-it-all husband (or wife), or even less-experienced lawyers. OPM Disability Retirement is all about knowing what OPM adjudicators want to hear.

Harvey says: You want a lawyer who has done scads and scads of cases!

Fees

You're a dummy if you think you're an expert on getting OPM Disability Retirement and don't want to pay a lawyer to help you.

You're a smarty if you realize that Disability Retirement can end up being one of the best financial investments in your life. That's because the several thousand dollars you will pay a lawyer will net you a yearly income of roughly half your salary until age 62. Plus, you can go out and work at another job for which you are not disabled (your new job can't pay more than 79.9999% of your old job's rate of basic pay).

Example: Charlie Chocolate needed Disability Retirement for a progressive nerve disease. He thought, "I'm a smart cookie, I'll just read Harvey's blog and do it all myself." Charlie did a great job getting fired, filled out all his forms, got his medical records and a statement from his doctor, and filed for Disability Retirement. But he was denied! OPM said his condition wasn't so severe that he couldn't be accommodated. OPM also told him he had the right to reconsideration.

Solution: Charlie Chocolate finally wised up and got a lawyer, and lucky for him. The lawyer looked at his application and said, "That's a nowhere physician's statement. We don't fix this, we don't win." Charlie Chocolate was confused, he thought a doctor's letter could only be written by a doctor. How could that be fixed? Well, if he was a smarty, he'd know that lawyers always have their tricks. Mr. Chocolate should have known that his lawyer was going to sweet talk the physician and help write the letter with him, to make sure it was perfect.

But lawyers also have their fees, and Charlie was out of money. Lucky for Charlie Chocolate, there are lawyers who will take contingency fees based on a percentage of any back annuity owed them by OPM when they win, and not charge a fee up front.

Getting Fired Can Be A Blessing

Summary: Your Chance Of Winning OPM Disability Retirement Can Be Dramatically Increased If You Are Fired By Your Agency Because Your Medical Condition Precludes you from Performing Your Job.

It may or may not surprise you but a Federal employee can be fired, if precluded from performing even one critical job element, by a medical condition.

But such firing can be a great thing if you are applying for OPM disability retirement.

Under a Federal court case, Bruner v. OPM, 996 F.2d 290 (1993), if you are fired for your inability to perform even one of your critical elements, as a result of your medical condition, you have a far better chance of winning OPM disability retirement, then had you not been fired at all, been fired for cause or had you resigned to avoid being fired.

This is called the "Bruner Presumption." You should ask an attorney about it if you are fired - oh wait, I am an attorney!

The Bruner case (and related case law) is complex. It talks in terms of "allocation of the burdens of production and persuasion," "shifting burdens of proof," etc.

Let your lawyer worry about those technicalities. What's important to you is the potential result.

"We usually think of being fired as the worse thing, but it can be a blessing in disguise."

Here's a snapshot of how the Bruner Presumption works:

Applicants for federal disability retirement always have the burden of proving to OPM that they are entitled to disability retirement. Although more complex then this, when an employee is fired for a disabling medical condition, the "burden of proof" switches. One minute you have the burden to prove to OPM that are disabled. The next minute, you're fired, and now OPM has the burden to prove that you are not disabled.

This may sound like a like a lot of legal mumbo-jumbo, but its practical effect on winning can be profound.

But, the “Bruner Presumption,” is not magic. It does not guarantee that you will win, since OPM may be able to “rebut” the Presumption.

Also, it also doesn’t work in circumstances where you might think it would. For instance, if you are fired for AWOL, even though you were AWOL because of your medical condition, you won’t get the benefit of the Bruner Presumption.

The law--the US Code (Statutes) and the Code of Federal Regulations (CFR) never mention the “Bruner Presumption.” They are not hiding it. It is just not a product of that part of the law.

The Bruner Presumption is a product of case law. Once something is buried in a case, forget it. Unless you know how to do legal research to find it, it might as well not exist.

Which might be why I haven’t found a whisper about the “Bruner Presumption” on OPM’s website, despite its vital importance to OPM disability retirement applicants. Therefore, it’s not surprising that most disability retirement applicants have never heard of it.

I remember when I wrote the first draft of this article a few years ago, I had just found out that at least one OPM employee had never heard of it. That employee was also about to make a decision in one of my cases! Not only that, but I know from experience that many who have heard of the Bruner Presumption simply ignore it.

When you file an OPM disability retirement case, in which you are entitled to the Bruner Presumption, make lots of noise about your right to it. They still might not hear you, but give it a try.

Some clients seeking OPM disability retirement, who are about to be or already have been medically-fired, want me to stop or overturn the medical firing. Bad idea! Let it happen. Use it to your advantage.

Once thing clients worry about is that their employment record will show that they were fired, when perhaps they can simply resign. Stop worrying. The record of a government

employee who is fired for any reason and who later wins disability retirement shows up as a disability separation and not as a firing.

So if you were fired for a medical disability and are considering applying for federal disability retirement with OPM, I say go for it!

If you have any more questions, though, fill out the form on the right or shoot me an email and we can talk about your specific case.